CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

ADMINISTRATIVE CIVIL LIABILITY ORDER R5-2010-xxxx
IN THE MATTER OF
DEL RAPINI CONSTRUCTION, INC.
PINE GROVE BLUFFS
AMADOR COUNTY

This Administrative Civil Liability Order is issued to Del Rapini Construction, Inc. (hereafter Discharger), pursuant to California Water Code (CWC) section 13385, which authorizes the imposition of administrative civil liability, and CWC section 7, which authorizes the delegation of the Executive Officer's authority to a deputy, in this case the Assistant Executive Officer. This Order is based on a settlement of claims presented in an Administrative Civil Liability Complaint, issued by the Executive Officer on 16 July 2009 (ACL Complaint), alleging that the Discharger violated the terms of National Pollutant Discharge Elimination System General Permit for Storm Water Discharges Associated with Construction Activity, Order 99-08-DWQ (General Permit).

The Assistant Executive Officer of the Central Valley Regional Water Quality Control Board (Central Valley Water Board or Board) finds, with respect to the Discharger's acts, or failure to act, the following:

Background

1. The Discharger is the owner and developer of Pine Grove Bluffs, a 30-acre construction project located at the intersection of Ridge Road and Highway 88 west of Pine Grove in Amador County (Site). The project includes both residential and commercial development. The commercial development involves about 12 acres of the project. Runoff from the commercial portion of the Site discharges into Jackson Creek. This Order only addresses the commercial portion of the property.

2. On 19 August 1999, the State Water Resources Control Board adopted the General Permit, which implements Waste Discharge Requirements for storm water discharges associated with construction activity.

3. The General Permit requires those who discharge storm water associated with construction activity to file a Notice of Intent to obtain coverage under the General Permit, and use best available technology economically achievable and best conventional control technology to reduce storm water pollution.

4. The CWC requires that dischargers obtain coverage under the General Permit prior to commencing construction activities. The Discharger obtained coverage under the General Permit and was assigned WDID No. 5S03C337319 on 27 September 2005.

Violation Chronology Alleged in Complaint R5-2009-0554

5. On 26 February 2007, Central Valley Water Board staff inspected the Pine Grove Bluffs construction project and observed numerous storm water management problems. Board

staff observed a significant amount of erosion on many of the graded roadways throughout the project and observed a sediment-laden discharge into one of the storm drain inlets. Board staff provided a verbal warning to the Discharger and explained that the Best Management Practices (hereafter BMPs, which consist of water control devices that prevent pollution runoff from non-point sources, such as construction sites) throughout the project needed to be upgraded for the Site to be in compliance with the General Permit. Photographs from the 26 February inspection are included as Attachment A, a part of this Order.

6. On 20 October 2008, Board staff inspected the project at the beginning of the rainy season and observed active grading underway on the commercial portion of the development. Board staff also noted steep slopes on the Site and the close proximity of the project to nearby surface waters. Only a few perimeter control BMPs were observed during the site inspection, and there were no effective erosion control BMPs at the Site as required by the General Permit. Board staff talked to the Discharger about the condition of the project. Board staff explained that the Site lacked an effective combination of erosion and sediment control BMPs as required by the General Permit, and requested that the Discharger implement additional BMPs to come into compliance. Photographs from the 20 October inspection are included as Attachment B, a part of this Order.

7. On 22 December 2008, staff re-inspected the commercial portion of the development and observed significant storm water management problems. The problems included large graded areas with minimal erosion control, poorly installed and maintained sediment control BMPs, poorly protected drain inlets, rilling on slopes, and slope failures that resulted in sediment deposition in a concrete-lined ditch. Also, significant erosion was observed throughout the project. Board staff walked the Site with the Discharger, identified the storm water management problems, and requested that the Discharger implement additional BMPs to come into compliance. The Discharger seemed to understand the concerns of Board staff, and verbally committed to work on stabilizing the Site. Photographs from the 22 December inspection are included as Attachment C, a part of this Order.

8. On 13 January 2009, Central Valley Water Board and Amador County staff inspected the commercial portion of the Site and observed that the Discharger had installed some additional BMPs; however, staff again identified significant storm water management problems throughout the project. The problems included large graded areas with minimal erosion control, steep slopes, poorly installed and maintained sediment control BMPs, and poorly protected drain inlets. Board and Amador County staff walked the entire Site with the Discharger, identified on-site storm water management problems, and recommended that the Discharger hire a consultant to help better stabilize the Site. Photographs from the 13 January inspection are included as Attachment D, a part of this Order.

9. On 24 January 2009, Board staff re-inspected the commercial portion of the development and again observed significant storm water management problems. These problems included large graded areas with steep slopes with very minimal erosion control BMPs, poorly installed and maintained sediment control BMPs, poorly protected drain inlets and BMPs overwhelmed by very turbid storm water. Sediment-laden storm water was also observed discharging from the project into Jackson Creek at two locations. Photographs from the 24 January inspection are included as Attachment E, a part of this Order.

10. On 2 February 2009, Board staff issued a Notice of Violation to the Discharger for the violations observed during the 24 January 2009 inspection. This Notice is included as Attachment F, a part of this Order.

11. On 11 February 2009, the Discharger responded to the Notice of Violation stating that although he objected to the Notice, he would comply in all ways possible. The Discharger also submitted a very brief plan and inspection reports. The inspection reports stated that the Discharger installed BMPs in selected areas of the project.

12. On 17 February 2009, staff re-inspected the commercial portion of the development and again observed significant storm water management problems. These problems included large graded areas with steep slopes with very minimal erosion control BMPs, poorly installed and maintained sediment control BMPs, and poorly protected drain inlets. In addition, discharges of sediment-laden storm water were observed entering Jackson Creek. Board staff conducted turbidity field measurements of the western outfall discharge from the Site and of Jackson Creek, upstream of the construction site. The turbidity was measured to be 979 NTUs at the western outfall location and 30 NTUs at Jackson Creek, upstream of the construction project. Downstream turbidity was not measured because of problems with access; however, staff observed that the turbidity in the creek downstream of the discharge location was significantly higher than that upstream, and did not observe other sources of turbid discharges, as shown in the photographs in Attachment H. A Staff Environmental Scientist at the California Department of Fish and Game reviewed the discharge and concluded “It is my opinion that the discharge of silt and sediment to this stream was deleterious to the aquatic life in Jackson Creek” and “the highly turbid runoff contained suspended sediments, which could have reduced habitat for aquatic life as well as caused deleterious effects due to physical impacts.” The DFG memo is included as Attachment G, a part of this Order.

    To calculate runoff during the 17 February 2009 storm event, staff used Tiger Creek Powerhouse (TCP) rainfall data and conservatively estimated the disturbed area contributing to the runoff to be 6 acres. The rainfall for the day was 1.12 inches. Using the rational method, staff conservatively calculated that the commercial portion of the Site discharged over 54,000 gallons of turbid storm water during the rain event. After the

inspection, staff called the Discharger and notified him of the storm water management problems observed on the project and requested that he implement additional BMPs to come into compliance.

13. On 19 February 2009, Board staff issued a second Notice of Violation to the Discharger for the violations observed during the 17 February 2009 inspection. This Notice is included as Attachment H, a part of this Order.

14. On 22 February 2009, Board staff re-inspected the commercial portion of the development. The inspection was conducted shortly after a significant rain event, and light rain was still falling during the inspection. Board staff inspected the entire Site and found no significant storm management improvements since the last inspection. Board staff also observed a turbid storm water discharge at both the eastern and western outfall locations. Discharge from the western outfall location was measured using a field turbidity meter to have a turbidity of 520 NTUs. Jackson Creek was also measured upstream of the Site to have a turbidity of 18 NTUs. Downstream turbidity was not measured because of problems with access; however, staff observed that the turbidity in the creek downstream of the discharge location was significantly higher than that upstream and did not observe other sources of turbid discharges, as shown in the photographs in Attachment I, a part of this Order.

    To calculate runoff during the 22 February storm event, staff again used the TCP rainfall data, which showed 0.84 inches of rain for that day. Using the rational method, staff conservatively calculated that the commercial portion of the Site discharged over 40,000 gallons of turbid storm water during the rain event.

15. On 23 February 2009, Board staff conducted a follow-up inspection during a light rain. Staff again observed turbid storm water discharges into Jackson Creek from both outfall areas. The turbidity of the discharge from western outfall location was measured to be 384 NTUs. The turbidity of Jackson Creek upstream of the Site was measured to be 30 NTUs. Downstream turbidity was not measured because of problems with access; however, staff observed that the turbidity in the creek downstream of the discharge location was significantly higher than that upstream and did not observe other sources of turbid discharges, as shown in the photographs in Attachment J, a part of this Order.

    To calculate runoff during the 23 February storm event, staff again used the TCP rainfall data, which showed 0.94 inches of rain for that day. Using the rational method, staff conservatively calculated that the commercial portion of the Site discharged over 45,000 gallons of turbid storm water during the rain event. After the inspection, Board staff called the Discharger and notified them of the storm water management problems observed during the inspection.

16. On 23 February 2009, the Discharger responded to the second Notice of Violation. The Discharger stated that he met with a storm water consultant and was working on the storm water issues. The Discharger submitted a BMP map, inspection reports and photographs of the Site.

17. On 4 March 2009, Amador County staff sent Board staff photographs from their 3 March 2009 inspection of the commercial portion of the construction site showing that additional BMPs had been installed on the project.

18. On 12 March 2009, Board staff re-inspected the commercial portion of the development and observed that additional erosion and sediment control BMPs had been installed in many areas of the project. However, Board staff observed some storm water management issues in two specific areas of the project along Ridge Road and along the west side of the project. Board staff informed the Discharger that additional erosion and sediment control measures were required to stabilize the Site in both of these areas.

19. The General Order states, in part, the following:

> A. DISCHARGE PROHIBITIONS
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> 3. Storm water discharges shall not cause or threaten to cause pollution, contamination or nuisance.
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> SECTION A: STORM WATER POLLUTION PREVENTION PLAN
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> 6. …At a minimum, the discharger/operator must implement an effective combination of erosion and sediment control on all disturbed areas during the rainy season.

20. Board staff found the Site in violation of Section A.6 during each of the nine inspections described above in the Complaint. All of those inspections were conducted during the rainy season. The Site continued to have storm water management problems and did not have an effective combination of erosion and sediment control on all disturbed areas as required by the General Permit.

    There were four days on which Board staff observed a violation of Discharge Prohibition A.3 of the General Permit. On 24 January 2009 and 17, 22 and 23 February 2009, Board staff observed very turbid discharges of storm water from the Site to Jackson Creek. Board staff measured the turbidity on three of the four days and found the turbidity to be significantly higher in the discharge than the background level in Jackson Creek. At a minimum, these discharges threatened to cause pollution, contamination or nuisance in Jackson Creek.

Regulatory Considerations

21. The *Water Quality Control Plan Central Valley Region—Sacramento River and San Joaquin River* Basins*, Fourth Edition* (hereafter Basin Plan), designates beneficial uses, establishes water quality objectives, and contains implementation plans and policies for all waters of the Basin. The Basin Plan does not specifically identify beneficial uses for Jackson Creek, but does identify present uses for Sacramento-San Joaquin Delta, to which Jackson Creek, via Amador Lake, Dry Creek and the Mokelumne River, is tributary. Through the Basin Plan's tributary rule, the beneficial uses for Jackson Creek are municipal and domestic supply, agricultural supply for irrigation and stockwatering, industrial process supply and service supply, contact water recreation, other non-contact water recreation, warm freshwater aquatic habitat, cold freshwater aquatic habitat, warm and cold fish migration habitat, warm spawning habitat, wildlife habitat and navigation.

22. Issuance of this Administrative Civil Liability Order to enforce CWC Division 7, Chapter 5.5 is exempt from the provisions of the California Environmental Quality Act (Pub. Resources Code section 21000 et seq.), in accordance with California Code of Regulations, title 14, section 15321(a)(2).

Violations under CWC section 13385 Alleged in Complaint R5-2009-0554

23. Administrative civil liability may be imposed for violations of the General Permit pursuant to CWC section 13385 which states, in part, that:

> (a) Any person who violates any of the following shall be liable civilly in accordance with this section:
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> (1) Section 13375 or 13376
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> (2) Any waste discharge requirements or dredged and fill material permit.
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> ********
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> (5) Any requirements of Sections 301, 302, 306, 307, 308, 318, or 405 of the Federal Water Pollution Control Act as amended.
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> (c) Civil liability may be imposed administratively by the State Board or a Regional Board pursuant to Article 2.5 (commencing with Section 13323) of Chapter 5 in an amount not to exceed the following:
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> (1) Ten thousand dollars ($10,000) for each day in which the violation occurs.
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> (2) Where there is discharge, any portion of which is not susceptible to cleanup or is not cleaned up, and the volume discharged but not cleaned up exceeds 1,000 gallons, an additional liability not to exceed ten dollars ($10) multiplied by the number of gallons by which the volume discharged but not cleaned up exceeds 1,000 gallons.
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> (e) In determining the amount of liability imposed under this section, the regional board, the state board, or the superior court, as the case may be, shall take into account the nature,

> circumstances, extent, and gravity of the violation, or violations, whether the discharge is susceptible to cleanup or abatement, the degree of toxicity of the discharge, and, with respect to the violator, the ability to pay, the effect on its ability to continue its business, any voluntary cleanup efforts undertaken, any prior history of violations, the degree of culpability, economic benefits or savings, if any, resulting from the violation, and other matters that justice may require. At a minimum, liability shall be assessed at a level that recovers the economic benefits, if any, derived from the acts that constitute the violation.

24. Pursuant to CWC section 13385(c), the maximum liability is based on 13 days of violation of the General Permit and the volume of sediment-laden storm water discharged from the Site. There are 13 days when the Discharger was in violation of the General Permit due to inadequate BMPs and rainfall events occurred, leading to the discharge of sediment-laden storm water from the Site. Those days are 24 and 25 January 2009, and 6, 8, 9, 11, 13, 14, 15, 16, 17, 22 and 23 February 2009. At $10,000 per day of violation, the maximum liability for days of violation is $130,000 (13 days x $10,000 per day).

    Board staff also calculated that over 139,000 gallons of sediment-laden storm water were discharged from the Site on 17, 22 and 23 February 2009. It is assumed that turbid discharges also occurred on other days when it rained, but staff conservatively calculated the volume of turbid discharge based on days when staff was present to document and measure the turbidity of the discharge. Board staff measured turbidity of the discharges from the Site on these three days and found the turbidity of the discharges to be significantly higher than that of Jackson Creek immediately upstream of the Site. Gallons discharged from the Site were conservatively estimated taking into account the size of the disturbed area, rainfall data, and application of a runoff coefficient. At $10 a gallon for each gallon over 1,000 gallons per storm event not susceptible to cleanup, the maximum penalty for the discharges from those three days is $1,360,000 (136,000 gallons x $10 per gallon).

    The total maximum liability is sum of the liability for days of violation and the liability for gallons discharged that was not susceptible to cleanup, which is equal to $1,490,000.

25. Pursuant to CWC section 13385(e), at a minimum, liability shall be assessed at a level that recovers the economic benefits derived from the acts that constitute the violation. The Discharger gained an economic benefit estimated at $3,500 per acre by not implementing appropriate BMPs at the Site, resulting in an estimated cost savings of $21,000. The assessed penalty is higher than the economic benefit.

26. On 16 July 2009, Executive Officer Pamela Creedon issued Administrative Civil Liability Complaint R5-2009-0554 to the Discharger. The Complaint proposed one hundred fifty-four thousand and five hundred dollars ($154,500) in civil liability pursuant to CWC sections 13385 and 13323. The amount of the liability was established based on a review of the factors cited in CWC section 13385.

27. Following issuance of ACL Complaint, the Discharger and the Board's Prosecution Team conferred for the purpose of settling the violations. On 12 October 2009, after arms-length negotiations, the Discharger, without conceding or admitting liability and to avoid further expense, submitted a proposal to settle the ACL Complaint by paying one hundred thirty six thousand dollars ($136,000). This settlement amount was accepted by the Executive Officer, who is the head of the Board's Prosecution Team. Pursuant to CWC section 13385, the Central Valley Water Board has considered the following factors:

Nature and Extent of Violations: The Discharger violated the General Permit by failing to install and maintain Best Management Practices (BMPs) and by discharging highly turbid storm water into Jackson Creek. Turbid discharges were observed by Board staff on three occasions and were measured to have significantly higher turbidity than the receiving water. The Discharger violated Section A.6 of the General Permit which requires that, "At a minimum, the discharger/operator must implement an effective combination of erosion and sediment control on all disturbed areas during the rainy season." The Discharger also violated Discharge prohibition A.3 of the General Permit states that, "Storm water discharges shall not cause or threaten to cause pollution, contamination, or nuisance." At a minimum, the discharge of highly turbid storm water threatened to cause pollution, contamination or nuisance.

Circumstances: This Site continued to have storm water management problems throughout the wet season even though it received multiple inspections from Board and County staff.

Gravity: The Discharger did not come into compliance with the General Permit and caused discharges of sediment-laden storm water to the nearby Jackson Creek. From 24 January 2009 to 23 February 2009, Board staff's inspections documented that the Site lacked adequate BMPs, and during that period, there were 13 days of adequate precipitation to produce runoff. Board staff conducted field turbidity measurements of the runoff from the Site as well as Jackson Creek upstream of the Site and found much higher levels of turbidity in the discharge from the Site.

Susceptibility of the Discharge to Cleanup: Once the turbid runoff entered Jackson Creek, there was no practical way to clean up to avoid impacts to water quality or beneficial uses.

Toxicity: Turbidity measurements were taken at the western discharge location from the Site and upstream in Jackson Creek on 17, 22, and 23 February 2009. Turbidity measurements taken at the discharge location were 979, 520, and 384 NTUs, respectively. Turbidity measurements taken at Jackson Creek upstream of the Site were 30, 18 and 30 NTUs, respectively. On 22 and 23 February, measurements

were taken after significant rain events the night before and runoff from the Site was minimal during the inspection. The highly turbid runoff contained suspended sediments, which could have reduced habitat for aquatic life as well as caused deleterious effects due to physical impacts. The DFG memo is included as Attachment G to this Order.

Degree of Culpability: The Discharger obtained coverage under the General Permit and was assigned WDID No. 5S03C337319 on 27 September 2005. The Discharger was aware of the General Permit requirements. Both Board and Amador County staff met with the Discharger on a number of occasions and discussed the need to effectively stabilize the Site and protect water quality in Jackson Creek.

Degree of Cooperation: After several discussions with staff, the Discharger appeared to understand the gravity of the situation and was cooperative with Board staff. The Discharger, however, did not implement an effective combination of erosion and sediment control on all disturbed areas during the rainy season as required by the General Permit.

Prior History of Violations: There is no past history of violations at the site. Board staff has issued several other enforcement letters to the Discharger for another construction project in Placer County. The Discharger received a Notice of Non-compliance in 2007 and a Notice of Violation in 2008 for the Cerise Estates construction project in Placer County. The Cerise Estates construction site also had storm water management problems because of inadequate BMPs.

Economic Benefit: The Discharger saved approximately $21,000 by not implementing adequate erosion and sediment control BMPs. Based on a survey of consultants, approximately $2,000 to $6,000 per acre is needed to provide the necessary erosion and sediment control measures for construction sites depending on the slope and soil type. The Site has erodible soils and steep slopes; therefore, an effective combination of both erosion and sediment control BMPs is critical to protect the Site. Since only a few BMPs were installed on the project for most of the wet season, the economic benefit received by the Discharger by not installing and maintaining an effective combination of erosion and sediment control BMPs at the Site was estimated to be $3,500 per acre. Board staff conservatively estimated that erosion and sediment control was necessary on 6 acres of the project. The economic benefit was estimated by multiplying 6 acres by $3,500 per acre.

Other Matters as Justice May Require

a) **Staff Costs**: Board staff spent a total of 150 hours investigating this incident and preparing this Order. The total cost for staff time is $22,500 based on a rate of $150 per hour.

b) Ability of the Discharger to Pay: Board staff contacted the assessor's office in Amador and Placer counties. Board staff found the Discharger owns 19 properties in Amador County encompassing approximately 44 acres. One 0.83 acre commercial property was assessed at $400,000[1], but the other property values were not available. Eight properties were found in Placer County encompassing approximately 338 acres, with an assessed value of $2,473,730[1].

28. On 23 April 2009, the Central Valley Water Board delegated the authority to issue Administrative Civil Liability Orders, where the matter is not contested by the Discharger, to the Executive Officer, or to an Assistant Executive Officer when the Executive Officer is serving as head of the Board's Prosecution Team (Resolution R5-2009-0027). Pamela Creedon is serving as the head of the Board's Prosecution Team for this matter, and therefore Assistant Executive Officer Kenneth D. Landau has the authority to issue this Order.

29. This Order constitutes a full and complete settlement of the violations herein mentioned. Notice of this settlement was published on the Central Valley Water Board's website, in a newspaper of general circulation in the community, and was provided to all interested parties. The 30-day public notice and comment period mandated by Federal regulations (40 CFR 123.27) has expired.

IT IS HEREBY ORDERED THAT:

1. Del Rapini Construction, Inc. shall pay **one hundred thirty six thousand dollars ($136,000)** in administrative civil liability no later than 30 days from the date on which this Order is issued. The payment shall be made by check made payable to the *State Water Pollution Cleanup and Abatement Account* and remitted to the Central Valley Regional Board located at 11020 Sun Center Drive, Suite 200, Rancho Cordova, California. The check shall have written upon it the number of this ACL Order.

2. Payment of the full liability amount shall resolve the violations charged in ACL Complaint R5-2009-0554.

3. The Assistant Executive Officer may refer this matter to the California Attorney General to obtain compliance with the terms of this Order.

4. This Order is final upon signature.

Any person aggrieved by this action of the Central Valley Water Board may petition the State Water Board to review the action in accordance with CWC section 13320 and California Code

[1] As determined by a call from Water Board staff to the County Assessor's Office on 1 July 2009.

of Regulations, title 23, sections 2050 and following. The State Water Board must receive the petition by 5:00 p.m., 30 days after the date of this Order, except that if the thirtieth day following the date of this Order falls on a Saturday, Sunday, or state holiday (including mandatory furlough days), the petition must be received by the State Water Board by 5:00 p.m. on the next business day. Copies of the law and regulations applicable to filing petitions may be found on the Internet at: http://www.waterboards.ca.gov/public_notices/petitions/water_quality or will be provided upon request

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KENNETH D. LANDAU, Assistant Executive Officer

_____
Date

Attachment A: Photographs from the 26 February 2007 inspection
Attachment B: Photographs from the 20 October 2008 inspection
Attachment C: Photographs from the 22 December 2008 inspection
Attachment D: Photographs from the 13 January 2009 inspection
Attachment E: Photographs from the 24 January 2009 inspection
Attachment F: Notice of Violation issued on 2 February 2009
Attachment G: DFG Memo regarding turbidity in Jackson Creek
Attachment H: Second Notice of Violation issued on 19 February 2009
Attachment I: Photographs from the 22 February 2009 inspection
Attachment J: Photographs from the 23 February 2009 inspection

RWM/SER :20 October 2009
Edits 11 January 2010